

CORRECTED

Resolution No.: 15-1089  
Introduced: July 18, 2005  
Adopted: July 18, 2005

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
IN MONTGOMERY COUNTY**

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By: County Council

**SUBJECT:** APPLICATION NO. G-831 FOR AMENDMENT TO THE ZONING ORDINANCE MAP,  
Stanley D. Abrams, Esquire, Attorney for Applicant Musgrove Road Joint Venture, LLP,  
OPINION AND RESOLUTION ON APPLICATION

Tax Account Nos. 05-02548227 and 05-00250740

**OPINION**

Local Map Amendment Application No. G-831, filed on November 8, 2004 by Applicant Musgrove Road Joint Venture, L.L.P., seeks reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land known Lot 2 and Lot 5, Thompson's Addition to Deer Park, 2415 and 2409 Musgrove Road, Silver Spring, Maryland, in the 5th Election District. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging.

The Hearing Examiner recommended denial of the application on the basis that the application does not satisfy the requirements of the purpose clause for the O-M Zone; that the proposed reclassification and development would not be compatible with existing and planned land uses in the surrounding area; and that the proposed reclassification does not bear sufficient relationship to the public interest to justify its approval. The Montgomery County Planning Board ("Planning Board") and its Technical Staff provided similar recommendations. The District Council agrees with these conclusions and incorporates by reference the Hearing Examiner's Report and Recommendation in this matter dated June 27, 2005.

### **A. Background**

The subject property contains approximately 3.5 acres of land located in the southwest quadrant of Musgrove Road and Columbia Pike (U.S. Route 29). It is comprised of Lot 5, a corner lot measuring about 2.77 acres, and Lot 2, adjacent to Lot 5 to the west, which contains about 0.75 acres. The combined property is irregularly shaped and fairly flat, sloping very gradually toward Route 29. It has approximately 467 feet of frontage on Musgrove Road, 259 feet of frontage on Route 29, and 127 feet of frontage facing the intersection of Musgrove Road and Route 29 diagonally.

Lot 5 is developed with a three-story, brick medical office building that has a total floor area of 38,112 square feet and a surface parking facility with 192 spaces. The building is in the western part of the site, set back about 100 feet from and roughly parallel to Route 29, and about 40 feet from Musgrove Road. A wetlands-type storm water management pond is located between the building and Route 29. Landscaping consists of trees around the building and parking area.

Lot 2 contains a vacant, one-story brick house with front and rear yards and a paved parking stub. Lot 2 also contains the entrance drive for Lot 5, which is approximately 30 feet wide and passes within a few feet of the front door of the house. The house has a two-car garage, but access to the garage is cut off by a row of evergreen trees. Lot 2 also has other, scattered trees.

Confronting to the north, across Musgrove Road, is a 35-acre Verizon facility in the I-3 Zone. It has a very large building ranging in height from three stories to seven, and extensive parking lots. Confronting diagonally across Route 29 is another large Verizon facility, in the O-M Zone. Directly confronting the subject site across Route 29 is an assisted living and nursing home complex. To the west, the subject property abuts Lot 1 of Thompson's Addition to Deer Park, at the corner of Musgrove and Old Columbia Roads, which is occupied by a single-family detached residence. To the south, the subject property confronts property owned by the Guru Nanak Foundation, which contains a single-family residential structure that is used as a Sikh Temple, a paved parking lot, and vacant, grassy land used for overflow parking.

The District Council accepts the Hearing Examiner's recommendation regarding the appropriate surrounding area for this case, which resulted from a thorough analysis of differing surrounding area recommendations made by the Planning Board, its Technical Staff, and the Applicant's land planning expert. Accordingly, the surrounding area designated for this application extends roughly from Route 29 on the east to Randolph Road on the south and includes (i) the Verizon site immediately north of the subject property, acknowledging that the northern portion of that site has no real relationship with the subject property, and (ii) the Stonecrest/Snowden's Mill community west of Old Columbia Road, acknowledging that the homes fronting on Old Columbia Pike would be most affected by this application.

The surrounding area as designated includes a mix of uses as described below:

- ◆ Medical office building on Lot 5 of subject property in R-90 Zone.
- ◆ Vacant single-family detached structure on Lot 2 of subject property, in R-90 zone. Desirability for residential use heavily impacted by proximity of entrance drive.
- ◆ Single-family detached residence on southeast corner of Musgrove and Old Columbia Roads, in R-90 Zone.
- ◆ Single-family homes west of Old Columbia Pike, particularly those fronting on Old Columbia Pike. Classified primarily under the R-200 Zone but with areas of R-90 and R-150 zoning.
- ◆ Two religious institutions with associated parking, both in the R-90 zone.
- ◆ 11-acre tract of undeveloped land in the R-200 Zone.
- ◆ Arbor Crest Senior Apartment Community, operating as a special exception in the R-200 Zone.
- ◆ Automobile filling station and other neighborhood commercial uses in the C-1 Zone.
- ◆ Verizon facility north of the subject property in the I-3 Zone, particularly the portion that fronts on or is close to Musgrove Road.

Beyond the limits of the surrounding area are the large Verizon facility to the northeast, in the O-M Zone; the assisted living and nursing home facilities on the east side of Route 29, which are in the R-90/TDR Zone and abut extensive single-family neighborhoods in the R-90 and R-200 Zones; and large office uses south of Randolph Road in the R-200, O-M and I-1 Zones.

The District Council agrees with the Hearing Examiner's conclusion that, taking into account (i) the residential properties fronting on Old Columbia Road, (ii) the single-family residential properties within the block that includes the subject property, (iii) the 11-acre vacant tract south of the subject property that is zoned for single-family residential use; and (iv) the Master Plan objective to maintain and enhance the single-family residential character of the area, the surrounding area should be considered predominantly single-family residential in character.

The lots that comprise the subject property were classified under the R-200 Zone as part of the 1958 County-wide comprehensive zoning. Both lots were reclassified to the R-90 Zone in SMA G-337, adopted in 1982. This zoning was reconfirmed by SMA G-563 in 1987. Lot 5 was the subject of rezoning application G-588, which sought to rezone from R-90 to O-M and was withdrawn without prejudice in 1988. R-90 zoning was again confirmed for both lots by SMA G-747, in 1997.

On May 23, 1984, the Board of Appeals approved special exception No. S-906 to permit a medical clinic on Lot 5. During the subdivision process that followed, the Planning Board required the property owners to move the access drive for the property off of Lot 5, onto the adjacent Lot 2 (which was or soon became under the same ownership), so that the driveway would be directly opposite the access drive for the Verizon facility (then C&P Telephone) across the street. Lot 2 was not included as part of the special exception, although the special exception was modified in 1985 to approve a revised site plan showing the access through Lot 2.

The Applicant proposes to enlarge the existing building by constructing an addition at the southeast corner of the building, near the open area that the Sikh Temple uses for overflow parking. The addition would be the same height as the existing building, and would use the same materials and architectural design. It would extend eastward to within approximately 43 feet of the existing right-of-way for Route 29, and would sit on land that is currently part of the surface parking lot. Internal corridors would connect each floor of the addition to the corresponding floor of the existing building. The total square footage of the addition is proposed at 14,174 square feet, and the building currently contains

approximately 38,112 square feet of space; the addition would increase the overall square footage to approximately 52,286 square feet.

The existing medical office building houses medical practices representing nine different specialties. The Applicant desires to enlarge the building both to allow existing tenants to expand and to accommodate additional medical practitioners, including potentially medical sub-specialties that are not currently represented in the building. To provide enough parking for the increased number of employees and patients, the Applicant proposes to tear down the vacant house on Lot 2 and use that lot for additional surface parking. The west side of the new parking area, adjacent to the single-family home on Lot 1, would be screened by a fence, if the Planning Board so directs at site plan, and by landscaping. Vehicular access to the site would not change.

The parking lot is currently lit by a number of light poles, all of which are shielded and directed downward to avoid light spillage onto other properties. The Applicant proposes to use the same types of fixtures in the expanded parking lot.

Pursuant to the optional method of application under Code § 59-H-2.52, the Applicant has submitted a schematic development plan ("SDP") that specifies which elements of the plan are illustrative and which are binding, i.e. elements to which the Applicant consents to be legally bound. The SDP in the present case proposes six binding elements, which are set forth on the next page. These binding elements limit the use to "Medical Office per O.M. Zone"; limit building coverage to 11.4% (only slightly higher than the current 10.5%); limit FAR to 52,286 square feet or 0.34 (only slightly higher than the current 0.31); limit building height to three stories/36 feet; and specify 267 parking spaces, five more than required for the specified square footage. See Ex. 61(a). The SPD also specifies as a binding element that cross easements will be recorded on Lots 2 and 5 to provide ingress, egress, common parking, maintenance and utilities for both properties, and that the Applicant will provide traffic mitigation/improvements as required by applicable governmental authorities, before the issuance of occupancy permits.

## Binding Elements of Schematic Development Plan, from Ex. 61(a)

SITE DEVELOPMENT DATA			
ITEM	EXISTING PROPERTY R- 90 ZONE SPECIAL EXCEPTION S-906 (lot 5)	PROPOSED O.M. ZONE REQUIRED/ ALLOWED	PROPOSED PROPERTY O. M. ZONE (Lots 2 & 5)
Use	Existing Medical Offices under Special Exception S-906	-	⊗ Medical Office Uses per O.M. Zone.
Property Area	121,076 sq. ft. or 2.776 ac.	N/A	⊗ 153,943 sq. ft. or 3.535 ac.
Building Coverage	12,704 sq. ft. or 10.5 %	60% maximum or 92,366 sq. ft.	⊗ 17,538 s.f. or 11.4 %
Paving Coverage	53,092 sq. ft. or 43.9 %	-	80,500 s.f. or 52.3 %
Green Area	55,280 sq. ft. or 45.6 %	10 % minimum or 15,394 sq. ft.	55,905 s.f. or 36.3 %
Impervious Area	65,796 sq. ft. or 54.4 %	90 % maximum or 138,549 sq. ft.	98,038 s.f. or 63.7 %
F.A.R.	38,112 sq. ft. or 0.31	1.5 maximum or 230,915 sq. ft.	⊗ 52,286 s. f. or 0.34
Building Height	3 Story or 32.8 ft.	3 Story or 60 ft.	⊗ 3 story or 36 ft.
Setbacks	Street (Rte. 29) = 98.5 ft. Street (Musgrove) = 40.7 ft.  South - side = 130 ft. +/- West - rear = 141 ft. +/-	Street = 15 ft. min. " = 15 ft. min.  Adjacent residential zoned property = 1/3 feet of height or 36/3 = 12 ft.	Rts. 29 = 16' Musgrove = 40.7' South = 20' West = 142'
Parking	191 spaces required 192 spaces provided	Medical office use @ 511,000 s.f. of gross floor area: 52,286 s.f. / 1,000 s.f. x 5 = 261.4 spaces. Say 262 spaces	⊗ Handicapped- Van = 4 Handicapped = 8, total H.C. = 12 Regular = 250 TOTAL = 267

USE ELEMENTS, DEVELOPMENT STANDARDS AND  
TRAFFIC MITIGATION IMPROVEMENTS SHOWN  
THUS ⊗ ARE BINDING.

## B. Purpose Clause

The District Council concludes that the proposed rezoning would not comply with the purpose clause of the O-M Zone, which is set forth in full below (from Code § 59-C-4.31).

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where

moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

The present application readily satisfies the first sentence of the purpose clause because the site is not within a central business district.

The remaining requirements may be summarized as follows:

- ◆ The word "area" refers to the area where O-M zoning is being proposed, and should be considered coextensive with the designated surrounding area.
- ◆ The term "adjoining neighborhood" refers to or includes, in this case, the entirety of the Stonecrest/Snowden's Mill community on the west side of Old Columbia Pike.
- ◆ O-M zoning is intended for areas:
  1. that are not appropriate for high-intensity uses;
  2. that are not predominantly single-family residential in character; and
  3. where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood.

Reviewing the three characteristics of areas where the O-M Zone is intended, the District Council agrees with the conclusion reached by the Hearing Examiner, and all the parties to this case that the surrounding area is not appropriate for high-intensity uses.

The District Council is in agreement with the Planning Board that at least the eastern edge of the Stonecrest/Snowden's Mill community should be considered part of the surrounding area for this application. As a result, the surrounding area can properly be considered predominantly single-family in character. Accordingly, the O-M Zone is not appropriate for the proposed location.

The evidence also supports the conclusion drawn by the Planning Board and Technical Staff that the proposed moderate intensity office building would have an adverse impact on the adjoining neighborhood. The purpose clause states specifically that the effect on the *adjoining* neighborhood

should be considered in gauging adverse impact, therefore the impact on the Stonecrest/Snowden's Mill community should be considered relevant. The Applicant stressed that the building addition would barely be visible from any part of the adjoining residential neighborhood except the intersection of Musgrove Road and Old Columbia Pike, and that the expanded parking area would be screened by setbacks, vegetation and, if the Planning Board so directs at site plan, fencing. However, as pointed out by Technical Staff, the existing building already is large compared to nearby residences and religious structures, most of which are one or two-story buildings; additional bulk is neither warranted nor compatible. The illustrative 20-foot parking lot setbacks shown on the SDP are not large enough to provide a significant buffer. More importantly, the proposed rezoning would increase the intensity of use on the site in a way that would be incompatible with the adjoining single-family neighborhood.

The 1989 zoning text amendment that limited medical clinic special exceptions to four practitioners demonstrated a policy decision on the part of the County Council that large medical clinics/office buildings were not appropriate in residential neighborhoods. That amendment very specifically allowed existing clinics to continue operating as special exceptions, but prohibited the Board of Appeals from approving any building expansions. The Applicant here seeks to circumvent that prohibition by securing a zoning classification that would obviate the need for a special exception. The District Council is not persuaded, however, that the building addition proposed here would avoid the adverse neighborhood impacts that the 1989 ZTA sought to control. The addition would bring an increase in the size of the structure, the amount of land covered by parking spaces, and the on-site activity levels. All would increase the pressures to which the Stonecrest/Snowden's Mill community is already subjected. Moreover, enlarging the parking lot onto Lot 2 would remove an important buffer/transitional parcel that currently eases the transition from Route 29 and commercial uses to the adjoining single-family detached community, and would remove a bit of "visual relief" from the many intense uses in the area.

The District Council finds that approval of the proposed rezoning and expansion of the existing commercial use to Lot 2 would increase the pressure for commercial development on Lot 1 (on



the corner of Musgrove Road and Old Columbia Pike) by removing most of the buffer that it currently enjoys from the commercial use on Lot 5. Lot 1 would see its neighbor change from a lot that is unoccupied, but from a visual standpoint is clearly residential, with very low levels of activity, to a parking lot serving a busy office building, with much higher levels of activity and attendant noise and odors. Fencing and landscaping can provide a visual and, to some degree, noise buffer between a residential use and a commercial one, but unless the setbacks and landscaping are quite extensive – like at the Verizon site north of Musgrove Road – an adjacent residential use will not be totally shielded from the adverse effects of juxtaposing differing land uses. These effects are expected and acceptable in an urban setting, where a mix of uses adjacent to one another is part of the urban landscape, but in a suburban context, they are unexpected and, therefore, more acutely felt.

The preponderance of the evidence demonstrates that approving the subject rezoning would pose a real danger to the continued residential use of Lot 1, both because of an increase in direct adverse effects, and because the rezoning would add to the non-residential pressures in the area. Applicant pointed out that each zoning case must be decided on its own merits, without regard to whether other nearby properties have succeeded in securing similar zoning. At the same time, however, one of the arguments raised by the Applicant in favor of the present application is that two properties near the subject site were rezoned to O-M under similar circumstances. Applicant's counsel and witnesses referred to these cases to support their analytical arguments, but they also relied on the existence of other O-M property in the area to provide general support for their argument that O-M zoning would be appropriate on the subject site. Moreover, it cannot be denied that although each floating zone case must stand or fall on its own merits, changes in zoning and land use will, over time, change the character of an area in a way that affects what may be considered compatible in that area – increasing numbers and intensity of non-residential uses will tend to make the area appear more appropriate for other, similar uses.

The District Council is also persuaded that if Lot 1 were to change to a non-residential use, an important transitional parcel and buffer would be gone. This would change the character of the

Stonecrest/Snowden's Mill community, particularly the homes fronting on or close to Old Columbia Pike, by creating direct exposure to a continuous string of non-residential uses.

For all of the above reasons, the District Council concludes that the proposed rezoning does not satisfy the purpose clause of the O-M Zone.

### **C. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned land uses in the surrounding area. As stated by the Planning Board, compatibility with the adjoining residential neighborhood is a very important factor in this case:

[T]he argument is persuasive, as put forth by a community member, that the subject site is a gateway to the single-family residential area and thus the site's land use and development should be compatible with single-family residential character.

Ex. 31 at 2.

The Applicant argues that the proposed use would be compatible with existing and planned uses in the surrounding area because the structure would be much smaller than the Verizon buildings, within the height limit for both the R-90 and R-200 zones, well buffered and significantly smaller than the senior apartment building south of the site. District Council is not persuaded of this position.

One of the Verizon facilities is completely excluded from the designated surrounding area. The other is included, but with the recognition that only the part closest to Musgrove Road – part of the parking lot – would actually be affected by the proposed rezoning. Moreover, the District Council is not persuaded that being smaller than the senior apartment building should play a large role in compatibility. The evidence established quite clearly that the senior apartment building was approved because of a need for affordable, independent housing for seniors, and that its final design was different from the design that was originally approved, which would have presented an appearance much more compatible with the confronting residential community.

The Applicant maintains that the vacant properties to its south would not be affected by the proposed rezoning and expansion. In the immediate sense, this is undoubtedly true, as these properties see little to no use during the weekday, when the subject building is most active. However, the

District Council is persuaded that intensification of the commercial use on the subject site would make development on the vacant land that is consistent with the Master Plan's objectives less likely.

For all of these reasons, as well as those stated in the previous section, the District Council concludes that the proposed rezoning and development would not be compatible with existing and planned land uses in the surrounding area.

#### **D. Public Interest**

The District Council further determines that the proposed reclassification does not bear sufficient relationship to the public interest to justify its approval. The Planning Board and Technical Staff opined that the proposed development would not be consistent with the Master Plan, and the District Council agrees. Although the Master Plan's land use plan used a commercial designation for Lot 5, it apparently did not so designate Lot 2. Moreover, the principal author of the Master Plan from Technical Staff testified that that designation was just a recognition of the existing use, not a recommendation for future use. In addition, the description of the subject property in the text explicitly referred to the 1989 ZTA that made the existing use undesirable in a residential neighborhood. The clear objectives of the Master Plan to retain single-family zoning and encourage more single-family detached housing would not be promoted by spreading the existing commercial activity to Lot 2 and providing permanent authorization for commercial activity.

The Applicant made some interesting arguments about why the Master Plan's objective of increasing single-family detached housing should not be used to block the present application, but the District Council finds that each one was effectively countered by Technical Staff. Both Technical Staff and the Planning Board still believe that the Master Plan's vision has a chance to succeed, and should be supported. Under the circumstances of this case, the District Council finds their recommendations persuasive.

The evidence supports a finding that the proposed development would have no adverse impact on traffic or local roadways. The new trips anticipated would not be sufficient to cause the planning area to exceed the accepted level of critical lane volumes. On that basis, Technical Staff

opined that that Local Area Transportation Review requirements would be satisfied. In addition, the SDP includes a binding element that commits the Applicant to providing traffic mitigation.

The Applicant argues that State Highway Administration's plan to build an above-grade interchange at Musgrove Road and Route 29 makes the subject property unsuitable for residential use, and justifies the requested rezoning. The District Council is persuaded that if the interchange is built as shown on the plans and computer simulations in the record, the property is very unlikely ever to be used for residential purposes. However, that provides only limited support for the proposed rezoning. Assuming that the interchange will be built, leaving the subject property as a special exception that cannot expand is more likely to support the goal of increased single-family detached housing than granting the requested rezoning, which would place Lot 2 clearly in commercial use and allow a considerable intensification of the overall use.

The Applicant argues that although community need for a particular use is not formally a factor in rezoning cases, evidence of such a need demonstrates that the rezoning would be in the public interest. There can be no question that, in general, ready availability of medical care, including in medical office buildings, is in the public interest. However, the Applicant did not succeed in demonstrating, by a preponderance of the evidence, that there is actually a need for medical services in the Fairland area which would be served by the proposed expansion, and which otherwise will go unserved or be under-served. The Applicant's testimony about the need for additional medical offices was largely anecdotal and not very specific. It was at least equally balanced by the testimony of the Chair of the Fairland Master Plan Citizens Advisory Committee, who lives in the Fairland area, that plenty of medical offices are available within a few miles of the subject site.

The District Council concludes, based on a preponderance of the evidence, that the public interest in promoting the implementation of a duly adopted Master Plan outweighs the public interest in permitting the expansion of the medical office building in question.

For all of the reasons stated above, the District Council concludes, based on the preponderance of the evidence, that the proposed reclassification and development do not bear sufficient relationship to the public interest to warrant their approval.


Because the present application conflicts with the applicable Master Plan, does not satisfy all elements of the purpose clause for the zone requested, and proposes a form of development that would not be compatible with the surrounding neighborhood, the application will be denied in the manner set forth below.

### **ACTION**

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-831, requesting reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land known Lot 2 and Lot 5, Thompson's Addition to Deer Park, 2415 and 2409 Musgrove Road, Silver Spring, Maryland, in the 5th Election District, is hereby denied.

This is a correct copy of Council action.

A handwritten signature in cursive script, reading "Linda M. Lauer", is written over a horizontal line.

Linda M. Lauer, Clerk of the Council